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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)
)
Implementation of Section 309(j)) PP Docket No. 93-253
and the Communications Act -)
Competitive Bidding)

PETITION FOR RECONSIDERATION OF
MCCAW CELLULAR COMMUNICATIONS, INC.

McCaw Cellular Communications, Inc. ("McCaw"), by its attorneys, hereby submits this petition for reconsideration of the Fifth Report and Order in the above-captioned docket.¹ For the reasons detailed below, the Commission should revise the procedures prescribed in the Fifth Report and Order for the conduct of the auctions for the award of broadband personal communications services ("PCS") licenses in the following two respects. First, the Commission should ensure that bidders in the broadband PCS auctions have sufficient time to submit well-informed bids. Second, the anti-collusion rules should be altered to permit the more effective formation of legitimate consortia during the course of the auctions.

I. SUMMARY

The Fifth Report and Order sets forth the basic rules and policies to be employed by the Commission in conducting the

¹ Implementation of Section 309(j) of the Communications Act - Competitive Bidding, FCC 94-178 (July 15, 1994) ("Fifth Report and Order"). Public notice of the Fifth Report and Order was given at 59 Fed. Reg. 37566 (July 22, 1994).

broadband PCS auctions. While McCaw believes in many respects that the Commission has adopted rational requirements, two areas warrant revision in order to ensure that these auctions accomplish the goals envisioned by Congress and the Commission.

First, the one business day adopted as the preferred length of the bidding rounds is likely to be too short to permit fully informed bidding on the part of broadband PCS applicants. During the initial stages of an auction, a maximum of two rounds per week should be scheduled, increasing to one round per week in later stages of the bidding. Although this may lengthen the time necessary for the auctions to close, the public will benefit from the increased levels of informed participation, higher bids, and decreased likelihood of default by winning bidders.

Second, the anti-collusion rules, even as recently modified, will continue to restrict, in a manner contrary to the public interest, the formation of consortia and other arrangements that will enhance the participation of the widest variety of entities in the PCS auctions and marketplace. While McCaw recognizes the Commission's concerns about deterring anticompetitive conduct that might otherwise result from open discussions among all PCS license applicants, the existing rules are overbroad. The Commission should provide important added flexibility to applicants and permit active bidders to form consortia with bidders that have withdrawn applications for the same license in the course of the auction. This will lead to a more effective

pooling of resources, particularly by entities with limited access to capital and financing opportunities.

II. THE COMMISSION SHOULD ENSURE THAT THE BROADBAND PCS
BIDDING ROUNDS ARE SUFFICIENTLY LONG TO PERMIT
INFORMED DECISION-MAKING BY PARTICIPANTS

For the broadband PCS auctions, the Commission has decided to "provide bidders with a single business day to submit bids, and conduct one round of bidding each business day."² The Commission has, however, retained the discretion to vary the length of bidding rounds or the time frame in which bids may be submitted "in order to move the auction toward closure more quickly."³ McCaw is concerned that, in an effort to conclude the broadband PCS auctions as quickly as possible, the Commission may sacrifice the opportunity for informed bidding by all applicants.

Initially, McCaw supports the Commission's retention of discretion to vary the length of bidding rounds or bidding intervals. The Fifth Report and Order correctly observes that the rounds during earlier stages of an auction can be shorter in duration than the later rounds, "when the consequences of bidding decisions are greatest [and] bidders need the most time to deliberate."⁴

² Fifth Report and Order ¶ 50.

³ Id.

⁴ Id.

Nonetheless, due to the complex nature of the broadband PCS auctions and the amount of capital likely to be involved (and thus at risk), McCaw believes that even the early rounds of these auctions require more than a single business day. In contrast to the narrowband PCS auctions, where an authorized representative of a carrier could make a bidding decision based upon one or two phone calls, the broadband auctions are likely to require frequent consultation with lenders, corporate board members, and technical staff, as well as among any joint venture partners or consortium members. The logistics of arranging financing and obtaining appropriate corporate approvals, particularly if the bid amounts considerably exceed anticipated levels, may take more than one business day. Moreover, for companies based on the West Coast, like McCaw, the time difference between the banks in New York and the business day in Seattle substantially curtails the actual length of a one-day round.

Finally, unless the Commission ensures that the results of each round of bidding will be available electronically in a form that can be readily downloaded by the bidders into their own computer systems, it will take considerable time for bidders to input the data from each round, analyze it, and formulate their next bid. Indeed, even if the bidding data is readily useable by applicants, the broadband PCS licenses are not homogeneous like the nationwide narrowband PCS authorizations recently auctioned, and bidding decisions inherently will be far more complex. Among

other things, after each round, a bidder will need to assess how that round's high bids affect that entity's own geographic or spectrum-based aggregation scheme, the potential effect on properties deemed to be highly interdependent by that bidder, and the nature of the competitive assessments reflected in the level of the high bid as well as the identity of the submitting applicant.

McCaw thus recommends that, in the early stages of the broadband PCS auctions, the Commission hold no more than two rounds per week. In the later stages, when bidding will perceptively slow, McCaw recommends that the Commission hold one round per week.

This approach admittedly is likely to increase the length of the auction, contrary to the Commission's intent to conclude the broadband PCS auctions as quickly as possible. This concern, however, is outweighed by the benefits associated with the resulting increase in informed participation, higher bids, and decreased likelihood of default. Clearly, these effects will result in licenses being awarded to the entities that in fact most highly value them. In turn, the public will reap the benefits associated with the license winner's desire to bring service to potential subscribers on a prompt basis as well as higher auction revenues. Overall, the broadband PCS auctions will be more effective, a result that clearly furthers the public interest.

III. THE ANTI-COLLUSION RULES AS APPLIED TO BROADBAND PCS WILL
UNDULY RESTRICT THE FORMATION OF LEGITIMATE CONSORTIA

The Fifth Report and Order applied Section 1.2105(c) of the Commission's Rules, as adopted in the Second Report and Order in this docket,⁵ to the broadband PCS auctions. This rule provides that:

from the time the short-form applications are filed until the winning bidder has made its required down payment, all bidders will be prohibited from cooperating, collaborating, discussing or disclosing in any manner the substance of their bids or bidding strategies with other bidders, unless such bidders are members of a bidding consortium or other joint bidding arrangement identified on the bidder's short-form application.⁶

In addition, under that policy, bidders are required "to identify on their Form 175 applications all parties with whom they have entered into any consortium arrangements, joint ventures, partnerships or other agreements or understandings which relate to the competitive bidding process."⁷ The Commission rationalizes this rule as necessary to prevent "parties, especially the largest firms, from agreeing in advance to bidding

⁵ Implementation of Section 309(j) of the Communications Act - Competitive Bidding, 9 FCC Rcd 2348 (1994) ("Second Report and Order").

⁶ Fifth Report and Order ¶ 91.

⁷ Id.

strategies that divide the market according to their strategic interests and disadvantage other bidders."⁸

In its recent decision on reconsideration of the Second Report and Order in this docket,⁹ the Commission has altered its anti-collusion rules. First, the Commission "will now permit bidders who have not filed Form 175 applications for any of the same licenses to engage in discussions and enter into bidding consortia or joint bidding arrangements during the course of an auction."¹⁰ In addition, to permit bidders to enter into consortium arrangements or add equity partners during an auction, the Commission will "allow applicants to amend their FCC Form 175 applications to make ownership changes after the filing deadline has passed, provided such changes do not result in a change of control of the applicant."¹¹ These changes were adopted in recognition of the Commission's conclusion that agreements between entities that have not or would not have applied for the same licenses do not raise concerns about anticompetitive conduct.¹² Rather, these modifications are deemed necessary in

⁸ Id., citing Second Report and Order ¶ 221.

⁹ Implementation of Section 309(j) of the Communications Act - Competitive Bidding, FCC 94-215 (Aug. 15, 1994) ("Second MO&O").

¹⁰ Id. ¶ 51.

¹¹ Id. ¶ 52.

¹² Id. ¶¶ 51-52.

order to promote essential bidder flexibility and to promote opportunities for bidders to ensure access to required capital.¹³

The Commission has stated that it will "rely primarily on the antitrust laws to prevent bidding collusion."¹⁴ Nonetheless, the anti-collusion rules appear at least partially to replicate restrictions imposed under the antitrust restrictions. This duplication is particularly troubling in light of the overbreadth of the anti-collusion policies and their adverse effects for the public interest. Thus, the recently adopted modifications to the anti-collusion rule are significant,¹⁵ the Commission's restrictions still stand as substantial impediments to the ability of bidders to participate fully and effectively in the broadband PCS auctions by, inter alia, obtaining access to additional levels of capital after the filing of their short form applications and during the course of the auctions themselves.

The experience with the recent narrowband PCS auctions help to illustrate these serious problems. In those auctions, the vast majority of bidders applied for all ten nationwide licenses. Although each bidder was only eligible for a maximum of three licenses, it made rational sense for these bidders to retain

¹³ Id.

¹⁴ Second MO&O ¶ 21.

¹⁵ Pursuant to the Commission's statements in the Fifth Report and Order, McCaw understands that Section 1.2105, as revised in the Second MO&O, will be applied in the broadband PCS auctions.

maximum flexibility to change bidding strategies during the course of the auction by applying for all available nationwide licenses. In addition, by applying for all licenses for which it is eligible, an applicant can keep confidential the identity of those licenses it has primarily targeted. It is likely that these two rationales will also drive bidders to behave similarly in the broadband PCS auctions.

In those circumstances, the recently adopted anti-collusion rule modifications will do little to relieve bidders of the strictures of the originally imposed provisions. Moreover, the Commission as well as the wireless industry fully expect that the costs of broadband licenses will far exceed those that resulted from the narrowband auctions -- and the winning bid amounts in those auctions were far higher than originally projected. Indeed, the narrowband PCS auction experience underscores the very real problems that smaller companies as well as designated entities will have in securing access to adequate amounts of capital to permit effective participation in the PCS auctions. The revised but still overly restrictive anti-collusion rule may block participation in broadband PCS by such entities that otherwise would be valuable participants in joint ventures, consortia, or other arrangements.

In order to address this very real problem while seeking to respond to the Commission's underlying concerns about anticompetitive collusion, McCaw suggests the following approach.

The Commission should permit bidders to form, during the course of an ongoing auction, consortia with other bidders that have affirmatively indicated that they have dropped out of the bidding for a particular license or group of licenses. This would allow bidders who lack the resources to win a license on their own to pool capital and other resources with other bidders interested in the same license. To prevent any possible anticompetitive conduct, the Commission could continue to forbid bidders from communicating with other bidders vying for the same license until a bidder has filed a notice with the Commission that it is withdrawing its application for the particular license at issue. Once there is no overlap of eligibility with another bidder for a license, the active bidder and the withdrawing bidder should be allowed to communicate with each other and to enter into consortium arrangements regarding that license. These arrangements then would be disclosed in an amendment to the Form 175 application for the active bidder.

Adoption of this modification of the anti-collusion rule for the broadband PCS auctions will help to ensure that, as the Commission has supported, bidders will "have greater flexibility to increase their competitiveness in the auction by combining their resources."¹⁶ McCaw believes that this revision will promote the participation of a large number of designated entities, small companies, and other entities with limited access

¹⁶ Second MO&O ¶ 51.

to necessary capital and financing arrangements in the PCS auctions that otherwise would be foreclosed simply as a result of the anticipated winning bid amounts. Moreover, this analysis is equally applicable to all the broadband PCS spectrum blocks and auctions. Achievement of this goal clearly is consistent with the Congressional and Commission goals of promoting participation by such entities in the wireless services marketplace and thus would further the public interest.

IV. CONCLUSION

The Fifth Report and Order generally provides a sound framework for the conduct of the broadband PCS auctions. In two respects, however, the decision should be reconsidered and revised. The Commission should ensure that auction participants have adequate time to prepare and submit their bids by increasing the length of the bidding rounds. In addition, the anti-collusion rules should be further modified to permit the

effective formation of legitimate consortia and other joint venture arrangements.

Respectfully submitted,

MCCAW CELLULAR COMMUNICATIONS, INC.

By: Cathleen A. Massey/lac
Cathleen A. Massey
Senior Regulatory Counsel
McCaw Cellular Communications,
Inc.
1150 Connecticut Avenue, N.W.
Fourth Floor
Washington, D.C. 20554
202-223-9222

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